LE COP

Supreme Court, U.S.
FILED
JUN 17 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1537

NEBRASKA STATE BOARD OF EDUCATION and NEBRASKA DEPARTMENT OF EDUCATION,
Petitioners,

vs.

STATE OF NEBRASKA, ex rel., THE SCHOOL DISTRICT OF HARTINGTON, also known as School District No. 8, Cedar County, Nebraska,
Respondent.

BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

ROBERT B. CROSBY,
of CROSBY, PANSING, GUENZEL & BINNING,
400 Lincoln Benefit Building
Lincoln, Nebraska 68508
Counsel for Respondent

GANT PUBLISHING COMPANY, 1610 N Street, Lincoln, Nebraska 68508

INDEX

Subject Index

	Page
Question Presented	1
Statement of the Case	2
Reasons that Writ Should not be Granted	2
Conclusion	6

Cases Cited

Johnson v. Sanders, 319 F. Supp. 421 (1970)	4
Lemon v. Kurtzman, 403 U. S. 602, 29 L. Ed. 2d 745, 91 S. Ct. 2105	4
Sanders v. Johnson, 403 U. S. 955, 29 L. Ed. 2d 865, 91 S. Ct. 2295	4
State of Nebraska ex rel. School District of Hartington v. Nebraska State Board of Education, et al., No. 37942, 188 Neb. 1, 195 N. W. 2d 161	3
Walz v. Tax Commission, 397 U. S. 664, 25 L. Ed. 2d 697, 90 S. Ct. 1409	4

Constitution Cited

First Amendment to the United States Constitution	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1537

NEBRASKA STATE BOARD OF EDUCATION and NEBRASKA DEPARTMENT OF EDUCATION,
Petitioners,

vs.

STATE OF NEBRASKA, ex rel., THE SCHOOL DISTRICT OF HARTINGTON, also known as School District No. 8, Cedar County, Nebraska,
Respondent.

BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

The respondent respectfully prays that a writ of certiorari be denied.

QUESTION PRESENTED

We do not agree with petitioners' statement of Question Presented.

The question presented is whether any constitutional provision prevents a public school district from leasing classrooms in a parochial school building, complete control

of the leased rooms being vested in the public school administration during the term of the lease.

STATEMENT OF THE CASE

With two clarifications we agree with petitioners' statement of the case. The clarifications follow.

This case involves the question of whether a public school can lease space in a private school to carry on a public school program. The parties stipulated (3:3; T109) that the State Department of Education refused to approve the public school's program "for the reasons stated in Paragraph 7 of the petition". Paragraph 7 of the petition says that the "sole reason" for declining to approve the program is the fact that the "project includes the use of leased classrooms in the Hartington Cedar Catholic High School Building."

None of the pleadings before judgment in the trial court mentioned the First Amendment to the Constitution of the United States. The judgment of the trial court does not specifically mention the First Amendment to the United States Constitution. While the motion for new trial does for the first time in the trial court introduce a reference to the First Amendment to the United States Constitution, it should be noted that the order of the trial court overruling the motion for the new trial does not mention the First Amendment.

REASONS THAT WRIT SHOULD NOT BE GRANTED

Hastily we must correct a gross error on Page 8 of the Petition For Writ of Certiorari, lines eight and seven counting from the bottom of the page. There the petitioners speak of the parochial school obtaining "approval and assistance of the State in order to perpetuate the

participation of the school in the Title I program." This misstatement is shocking. The parochial school has no dealings with the State, does not apply for approval of anything, does not ask for assistance of the State in any way, does not participate in the Title I program. The parochial school is simply and solely a landlord. Its only connection with this situation is that it owns the building in which are located the two classrooms which our client, Hartington public school district, wants to lease.

Strangely, this same kind of misstatement occurred on Page 6 of the petitioners' original brief in the Nebraska Supreme Court, and the petitioners retracted the statement and acknowledged their error on Pages 17-18 of their Reply Brief in that court.

As pointed out in the opinion of the Nebraska Supreme Court below, Page 3 of the Appendix to the Petition for Writ of Certiorari (*State of Nebraska ex rel. School District of Hartington v. Nebraska State Board of Education, et al.*, No. 37942, 188 Neb. 1, 195 N. W. 2d 161):

> "The right of a public school district to use or lease all or a part of a church or other sectarian building for public school purposes has been upheld in a number of cases. As stated by the Supreme Court of Michigan in In re Proposal C, 384 Mich. 390, 185 N. W. 2d 9: 'Premises occupied by lease or otherwise for public school purposes under the authority, control and operation of the public school system by public school personnel as a public school open to all eligible to attend a public school are public schools. This is true even though the lessor or grantor is a nonpublic school and even though such premises are contiguous or adjacent to a nonpublic school.' See, also, State ex rel. Conway v. District Board, 162 Wis. 482, 156 N. W. 477; Dorner v. School Dist.,

137 Wis. 147, 118 N. W. 353; Millard v. Board of Education, 121 Ill. 297, 10 N. E. 669; Scripture v. Burns, 59 Iowa 70, 12 N. W. 760; Swadley v. Haynes (Tenn.), 41 S. W. 1066; Rawlings v. Butler (Ky.), 290 S. W. 2d 801, 60 A. L. R. 2d 285; Crain v. Walker, 222 Ky. 828, 2 S. W. 2d 654; City of New Haven v. Town of Torrington, 132 Conn. 194, 43 A. 2d 455; State ex rel. Johnson v. Boyd, 217 Ind. 348, 28 N. E. 2d 256."

The petitioners cite only three decisions, none of which even resemble the facts in this case. The three cases cited by the petitioners are *Lemon v. Kurtzman,* 403 U. S. 602, 29 L. Ed. 2d 745, 91 S. Ct. 2105; *Sanders v. Johnson,* 403 U. S. 955, 29 L. Ed. 2d 865, 91 S. Ct. 2295; and *Walz v. Tax Commission,* 397 U. S. 664, 25 L. Ed. 2d 697, 90 S. Ct. 1409.

In *Lemon,* the United States Supreme Court rejected the constitutionality of Pennsylvania legislation which made *direct money grants* to church organizations for the purchase of educational services.

In *Sanders,* the United States Supreme Court affirmed without opinion a three-judge decision in the United States District Court for the Connecticut district. The three-judge District Court had held that a law which authorized the state to contract with parochial elementary and secondary schools for "purchase" by the state of "secular educational services" to be supplied to children was invalid under the establishment clause (*Johnson v. Sanders,* 319 F. Supp. 421 (1970)).

In *Walz* the United States Supreme Court simply held that it is proper for a state to grant *property tax exemptions* with respect to property owned by religious organizations and used solely for religious worship.

The facts in the above three cases do not even resemble the facts in the case at bar.

In the case at bar the local Hartington public school district seeks to lease classroom space from the parochial school to carry on a remedial reading program and a remedial mathematics course. The public school district did not have any space in its own buildings for these courses. Exhibit C of the petition in the trial court (T13) shows that enrollment in the remedial reading program would have been 84 students, 52 from the public school, 32 from the private school; in the remedial mathematics course the enrollment would be 55 students, 39 from the public school, 16 from the private school.

In their reply brief in the Nebraska Supreme Court the petitioners stated on Page 5, "we further agree it is not ipso facto unlawful that a public school district (lease) property from a church-affiliated organization or institution." However, although the public school will have exclusive possession and control of the leased classrooms, the petitioners seem to feel that somehow there will be entanglement or a need for excessive surveillance from the mere fact that the landlord is a parochial school. In the Nebraska Supreme Court, as that court pointed out in its opinion, the petitioners asserted "that it is unconstitutional for parochial school children to participate in an educational program under the Federal Act." It would seem that to deny a student the right to participate in a program offered by a public school district solely because that student is enrolled in a parochial school would violate that student's right to a free exercise of religion and to equal protection of the law. Further, to deny a parochial school the right to lease some of its classrooms would

seem to deny to the parochial school the equal protection of the law.

CONCLUSION

For the above reasons it is urged that the Writ of Certiorari should not be issued.

Respectfully submitted,

ROBERT B. CROSBY, of
CROSBY, PANSING, GUENZEL & BINNING,
Lincoln, Nebraska 68508
400 Lincoln Benefit Building

Counsel for Respondent